United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1593

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1593

UNITED STATES OF AMERICA,
Appellee,

—v.—

JULIUS SCHURKMAN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America

JEREMY G. EPSTEIN,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1593

UNITED STATES OF AMERICA,

Appellee,

—v.—

JULIUS SCHURKMAN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Julius Schurkman appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on December 14, 1976, after a four day trial before the Honorable William C. Conner, United States District Judge, and a jury.

Indictment 76 Cr. 649, filed July 15, 1976, charged Schurkman in Count One with offering a bribe to a public official and James Taylor in Count Two with paying a bribe to a public official, both in violation of Title 18, United States Code, Section 201(b).

Trial commenced against Schurkman on October 20, 1976, and concluded on October 27, when he was found guilty on Count One.*

* Prior to trial James Taylor entered a plea of guilty to Count Two. He received a suspended sentence and a $1,500 fine.

On December 14, 1976, Schurkman received a sentence of eighteen months' imprisonment pursuant to Title 18, United States Code, Section 3651, with the condition that he spend three months in a jail-type institution. The execution of the balance of the sentence was suspended, and Schurkman was placed on probation for a period of fifteen months.

Schurkman remains free on bail pending appeal.

Statement of Facts

The Government's Case

On or about January 20, 1975, Stewart Gubenko, a revenue agent employed in the Manhattan district office of the Internal Revenue Service, was assigned to audit the corporate income tax return of the JTR Trucking Corporation for the fiscal year ending March 31, 1974. (Tr. 23-24).* JTR was represented during the audit by Julius Schurkman, an accountant with offices in Williston Park, Long Island. Gubenko first met with Schurkman in the latter's office on October 31, 1975. On that occasion, he reviewed JTR's cash disbursements book and general ledger and stated that he would return to make a more extensive review of the corporation's books. (Tr. 25-28).

On January 27, 1976, Gubenko went to the offices of JTR, located at 489 Washington Street in Manhattan, where he met Schurkman and James Taylor, JTR's president and sole shareholder. Upon examining the JTR books, Gubenko found substantial irregularities. He noticed huge disbursements from the petty cash account that could not be accounted for. He discovered that

---

* "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; and "Br." refers to appellant's brief.

Taylor's wife was receiving monies listed as "commissions" on the corporate books which she did not declare as income on her individual tax return. Gubenko learned that JTR was paying rent to the Agrecland Corporation, the owner of its building. Upon inquiring he learned that Taylor owned 100 per cent of Agrecland's stock, an affiliation which was not disclosed in the JTR return. An examination of Taylor's individual tax return revealed approximately $4,000 in interest income. When Gubenko asked Schurkman about the size of this figure, he learned that Taylor had taken large interest free "loans" from JTR that he had placed in his savings account. (Tr. 28-32).

Gubenko was also unable to reconcile the entries on the JTR tax return with the books and records given him by Schurkman. He told Schurkman that further substantiation for the disbursements from the corporate loan and petty cash accounts would be needed. Schurkman told him not to worry and assured him that "it could be worked out." He repeated the assurance to Gubenko several times that day. (Tr. 32-33).

Gubenko's suspicions were aroused by Schurkman's remarks, and, on the following day, January 28, 1976, he reported this conversation to the Inspection Service of the Internal Revenue Service.

Gubenko returned to the JTR offices to continue his audit on February 5, 1976.* He again asked Schurkman

---

* Members of the Inspection Service recorded a telephone conversation between Gubenko and Schurkman on January 28, 1976 during which the February 5 meeting was arranged. The inspectors did not, however, equip Gubenko with a recording device prior to this meeting because their procedures required evidence of a concrete bribe offer before authorization could be sought from the Justice Department for the use of a body recorder. A lower standard existed for recording telephone conversations. (Tr. 147-51).

for further substantiation for the disbursements from the corporate loan and petty cash accounts, but little was furnished him. Gubenko came to the conclusion that, if certain entries in the corporate books remained unsubstantiated, JTR and Taylor personally faced an additional tax liability of more than $50,000. (Tr. 35-36).

Later that same day Schurkman and Gubenko went out to lunch. Gubenko again told Schurkman that he had not yet been furnished with substantiation for many of JTR's expenditures. Schurkman told him not to worry, repeated that the matter could be worked out, and added that "things could be done for you." When Gubenko asked what he meant by that, Schurkman began scribbling with his index finger on the table cloth. When Gubenko asked what he was doing, Schurkman took a piece of paper and wrote upon it: "3 US 7 me and you, one third me, two thirds you." Gubenko asked Schurkman whether he was talking about money, and Schurkman stated he was. He explained to Gubenko that "three" would go to the government, and he and Gubenko would split the rest, with Gubenko receiving two thirds. Gubenko asked Schurkman if he meant hundreds of dollars, and Schurkman said that he meant thousands; he then wrote the figure "12 M" for $12,000 on the same piece of paper. He also told Gubenko that, if he were interested in the offer, he should call Schurkman's office during the following week and leave the message "let's talk" with his secretary. Schurkman also told Gubenko that his suspicions concerning the discrepancies in the JTR books were correct. He told Gubenko in conclusion that Taylor had no choice but to go along with his proposal to pay off Gubenko, and that if he did not Gubenko could do whatever he wanted with the case. (Tr. 36-43).

After lunch, Schurkman and Gubenko returned to the JTR office, where Gubenko performed some additional

work before leaving for that day. After Gubenko departed, Schurkman told Taylor that he was in "a lot of trouble", and that the audit would cost him a great deal of money. When Taylor asked how much, Schurkman told him $15,000. (Tr. 43, 175-78).

On February 23, 1976, Taylor went to Schurkman's Long Island office to discuss his tax problem further. On that occasion, Schurkman again told him that he would have to pay $15,000, of which $12,000 would go toward bribing Gubenko, and $3,000 toward the payment of taxes. Schurkman told Taylor that, if Gubenko were not paid off, Taylor would certainly be prosecuted for tax evasion and sent to jail. Taylor told Schurkman that he was willing to pay the money, but wanted to receive an official document from Gubenko setting forth his tax liability before he made payment. Schurkman told him that he could not receive any documentation before he made payment. Schurkman also told Taylor that in dealing with Gubenko, he intended to communicate with him only by written notes, because revenue agents were often "wired" and Schurkman had no intention of going to jail on Taylor's behalf. When Taylor said that he would have difficulty raising the money, Schurkman suggested that he mortgage his house. (Tr. 178-85).

Gubenko next met Schurkman on February 24, 1976 at the offices of a company in the Bronx for which Schurkman was doing accounting work.* During lunch at a nearby restaurant Schurkman again began to communicate with Gubenko in writing. He handed Gubenko a piece of paper on which a message had already been written which stated, in essence, that Taylor was willing

---

* Prior to this meeting Gubenko had been equipped with a recording device by inspectors from the IRS. (Tr. 45).

to pay Gubenko the bribe but insisted on first receiving "paper" from the IRS stating his tax liability. Gubenko refused to entertain this procedure, and Schurkman agreed that it would be "ridiculous" for him to do so; he pointed out that once Gubenko released the statement of tax liability, Taylor was under no obligation to pay him. Schurkman asked for a few more days in which to convince Taylor to abandon his insistence on receiving a statement of tax liability before making payment. Gubenko agreed, and the men parted. (Tr. 45-49, 53-60; GX 2).

Between February 25 and February 27, 1976, Schurkman spoke by telephone to both Taylor and Gubenko. He tried to persuade Taylor to pay Gubenko without first receiving a statement of tax liability, but was unsuccessful. Taylor told him that he insisted on a written statement from the IRS before making payment. Schurkman told Taylor that, because he would not pay the bribe in the way Schurkman recommended, he was withdrawing as his accountant. Schurkman then sent Taylor a telegram announcing his withdrawal. Schurkman told Gubenko by telephone that Taylor would not make payment in the agreed upon manner; that Taylor was a "moron"; and that consequently Schurkman was withdrawing from the case. (Tr. 60-67, 185-94; GX 3-5).

After Schurkman's withdrawal, Taylor sought to contact Gubenko directly. They spoke by telephone on March 1 and 2, 1976 and arranged a meeting for March 3 at the JTR office. After approximately two hours of negotiating, Taylor paid Gubenko $2,000 in cash, in exchange for which Gubenko gave him two revenue agent's reports which declared a minimal increase in the tax liability of JTR and of Taylor personally. (Tr. 70-72, 194-98; GX 7, 8).

In mid-March, 1976, after Taylor had been arrested for bribery, he was visited by Schurkman at the JTR office. Schurkman told Taylor that he had caused him "a lot of trouble" and warned Taylor that he would "pay for it." (Tr. 199-201).

The Defense Case

Schurkman offered no evidence.

ARGUMENT

POINT I

The Trial Court's Comments on Schurkman's Failure to Testify Were Not Improper.

Schurkman contends that Judge Conner, in his supplemental charge to the jury, improperly commented on his failure to testify on his own behalf. In considering this argument it is useful to review all of Judge Conner's remarks to the jury on the subject of the defendant's right to remain silent.

Immediately after jury selection and prior to the opening statements of counsel, Judge Conner stated:

> "I want to remind you that under our U. S. system of government, a defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. Moreover, he can't be compelled to give evidence against himself. That means that he has a privilege to remain silent in a criminal prosecution, to say absolutely nothing and to leave the government to prove its case.
>
> The fact that a defendant may elect to remain silent can't be taken by you as indicating that he may be guilty or that he has something to hide.

> If you could conclude merely because a defendant didn't choose to take the stand or call any other witnesses he must have a guilty conscience, the privilege that the constitution gives us not to give evidence against ourselves wouldn't be worth very much, so you can't take into consideration the defendant elects not to take the stand if he does in fact so elect." (Tr. 3).

During his charge, Judge Conner gave the jury the following instruction:

> "The defendant is presumed to be innocent until the government has proven him guilty beyond a reasonable doubt. That presumption of innocence existed when the indictment was brought, it existed throughout the trial, and it will continue during your deliberations in the jury room.
>
> The defendant, having that presumption of innocence, does not have to prove anything. He is entitled to remain absolutely silent and to leave with the government its burden of proof beyond a reasonable doubt.
>
> The defendant cannot be required to give evidence against himself. He is entitled to remain silent. The Constitution gives him that privilege. And the privilege would be worthess if because he chose to remain silent you could presume that he must be guilty or that he has something to hide.
>
> He is entitled to remain silent. In this case he elected to do so. But you cannot take the fact that he elected to avail himself of that constitutional right as evidence against him." (Tr. 301).

At the conclusion of the charge, Schurkman's counsel advised Judge Conner that he objected to the Court's use of the term "give testimony against himself." (Tr. 318). Judge Conner concluded that counsel felt that his charge,

as given, might improperly suggest that the defendant would necessarily incriminate himself if he took the witness stand. In a supplemental instruction, Judge Conner undertook to correct this possible misunderstanding:

> "In my charge I reminded you of the constitutional privilege which every defendant has not to give testimony against himself. That is the wording of the Fifth Amendment to the constitution. I don't mean to suggest that if the defendant did testify his testimony would be against himself.
>
> Obviously, if he were going to give testimony against himself he wouldn't testify. He could just as well give testimony for himself, but he is not required to do that, and in referring to that privilege in the wording of the constitution I did not mean to suggest to you that if he had testified it would be against himself. As I told you, that privilege of remaining silent and of not testifying is a very important privilege and its value would be totally destroyed if you could assume that because a defendant had not chosen to testify or to call any other witnesses that he has no evidence he could adduce and that he must be guilty.
>
> So don't attach any importance at all to the fact that in this case the defendant did not elect to take the stand or to call any other witnesses. He has that constitutional privilege and in this case he chose to avail himself of it as he was entitled to do." (Tr. 319-20).

No objection was taken to this supplemental instruction.*

---

* The failure to object to the supplemental instruction is a waiver of the deficiency in the charge now assigned as error. See Fed. R. Crim. P. 30; *United States* v. *Santiago*, 528 F.2d 1130, 1135 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3659 (U.S., May 19, 1976); *United States* v. *Goldberg*, 527 F.2d 165, 173 (2d Cir. 1975); *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974).

By wrenching one sentence of the foregoing supplemental instruction out of the context in which it was delivered (Br. 12), Schurkman argues that Judge Conner deprived him of rights secured by the Fifth Amendment. The argument cannot withstand serious scrutiny; indeed, it does not even survive a thorough reading of the supplemental charge. In that charge, Judge Conner went to extraordinary lengths to instruct the jury not to hold Schurkman's silence against him. In focusing on a single sentence Schurkman has both distorted the fundamental meaning of the instruction and violated the axiom that a trial judge's charge must be considered "in the context of the whole trial record, particularly the evidence and the arguments of the parties." *United States* v. *Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); see also *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973); *Boyd* v. *United States*, 271 U.S. 104, 107 (1926); *United States* v. *DeAngelis*, 490 F.2d 1004 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974). No fair reading of Judge Conner's charge yields the conclusion that Schurkman's Fifth Amendment rights were in any manner curtailed.

Although Judge Conner's remark that "obviously, if [Schurkman] were going to give testimony against himself he wouldn't testify" would perhaps have been better left unsaid, it did not seriously prejudice Schurkman. This Court and others have had occasion in the past to review charges that contained even less felicitous instructions on a defendant's failure to testify. In each case a single unfortunate phrase was not deemed sufficient to require reversal if the charge, taken as a whole, adequately apprised the jury of the defendant's Fifth Amendment privilege. In *United States* v. *Schabert*, 362 F.2d 369 (2d Cir.), *cert. denied*, 385 U.S. 919 (1966), the trial judge, prior to instructing the jury on the defendant's

failure to testify, stated "I normally do not include this in the charge. I do so only because I have been requested to do so." 362 F.2d at 372. This Court found that these remarks were improper, but did not so undermine the trial judge's otherwise accurate instruction as to require reversal. In *United States* v. *Tannuzzo*, 174 F.2d 177 (2d Cir.), *cert. denied*, 338 U.S. 815 (1949), the trial judge charged that "a defendant has the right . . . not to submit himself to cross-examination." 174 F.2d at 180. This Court rejected the argument that the jury was thereby led to assume that cross-examination would inevitably elicit testimony adverse to the defendant's interests. In *United States* v. *Van Drunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974), the trial judge inadvertently omitted the "not" in advising the jury that a defendant has an absolute right not to testify. He also instructed the jury to consider the defendant's testimony with extreme caution when the defendant had not, in fact, taken the stand. These errors were found to be harmless. See also *United States* v. *Martin*, 511 F.2d 148 (8th Cir. 1975). If each of the foregoing lapses has been deemed insufficient to require reversal, then the minor flaw in Judge Conner's otherwise exemplary instruction is deserving of such treatment *a fortiori*.*

---

* The cases cited by Schurkman in his brief have not the slightest relevance to the facts of this case. In *Wilson* v. *United States*, 149 U.S. 60 (1893), a conviction was reversed because the trial judge failed to criticize a prosecutor's adverse comments on a defendant's failure to testify. In *Griffin* v. *California*, 380 U.S. 609 (1965), the trial court instructed the jury that it could draw adverse inferences from a defendant's failure to testify. In *People* v. *Fitzgerald*, 156 N.Y. 253 (1898), the trial court instructed the jury that the defendant's failure to take the stand constituted a failure to deny the Government's evidence. The only case cited by Schurkman that bears on the point at issue here is *United States* v. *Schabert*, *supra*, which, as previously discussed, supports the Government's position.

POINT II

The Prosecutor's Summation Was Not Improper.

Schurkman claims that he was severely prejudiced by certain remarks made by the prosecutor at the close of his summation in chief. At the conclusion of that summation, the prosecutor stated:

> "Ladies and gentlemen, bribery is an extremely serious offense. It's serious enough so that Congress when it passed the statute made the offer of a bribe itself a crime and the reason for this is obvious. For every honest employee like Stewart Gubenko, who immediately and instinctively reports the offer of a bribe, there may be another IRS agent who just may be tempted, who just may be motivated to curb his actions or to give preferential treatment because of the offer of money.
>
> Ladies and gentlemen, to have an efficient and effective government, we can't afford to have public officials deflected from their duties in this manner.
>
> Ladies and gentlemen, in this regard, I want to leave you with one last thought as to your obligations as jurors: Mr. Schurkman is an accountant. He is a professional and performs a public function. If he is found not guilty by your verdict, he is free to resume his activities, he is free to go about, ruin the lives of his other clients, he is free to go about trying to corrupt other public officials, just as he tried to corrupt Mr. Gubenko.
>
> Ladies and gentlemen, the public deserves protection against the corrupting activities of the likes of a Julius Schurkman and I ask you in your verdict to afford the public that protection." (Tr. 265-66).

Although no objection was interposed to these remarks by Schurkman's counsel, he now claims that they so inflamed the minds of the jurors as to prevent a dispassionate consideration of Schurkman's case. The Government submits that the argument was not improper, and even if it was improper, Schurkman's failure to object precludes his contesting its propriety on appeal.

The law is clear in this Circuit that failure to object to remarks in summation forecloses consideration of those remarks on appeal. *United States* v. *Ong*, 541 F.2d 331, 342-43 (2d Cir. 1976); *United States* v. *Canniff*, 521 F.2d 565, 571-72 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); *United States* v. *Briggs*, 457 F.2d 908, 911-12 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972); *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). As Judge Mansfield recently noted, "[t]he failure to object not only precludes our consideration of [prosecutorial statements] on appeal . . . but indicates counsel's own difficulty in finding any prejudice." *United States* v. *Canniff*, *supra*, 521 F.2d at 572. Where no objection has been interposed, this Court has indicated that it will reverse "only if the summation was so 'extremely inflammatory and prejudicial' . . . that allowing the verdict to stand would 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Briggs*, *supra*, 457 F.2d at 912. The prosecutor's opening and rebuttal summations, which covered approximately thirty-eight pages of transcript and elicited only two objections from defense counsel, could not be considered inflammatory by any rational criterion. Schurkman's failure to object is thus to his claim.

Even considered on its merits, there is no force to the contention that by referring to Schurkman's possible

future conduct, the prosecutor exceeded the bounds of propriety. Taken in context, that portion of the closing argument was an effort to impress upon the jury the importance of prosecutions for bribery, a classic "victimless crime." It was even more important to make such an impression in this case, where Schurkman was accused merely of offering a bribe. There is simply nothing wrong with attempting to convey to the jury the importance of the task before them, or the value which the Government places on the prosecution of certain crimes. See *Malley* v. *Connecticut*, Dkt. No. 76-2072, slip op. 1029, 1035 (2d Cir., Dec. 20, 1976); *United States* v. *Clark*, 525 F.2d 314, 316 (2d Cir. 1975); *United States* v. *Wilner*, 523 F.2d 68, 73 (2d Cir. 1975); *United States* v. *Ramos*, 268 F.2d 878, 880 (2d Cir. 1959). Nor is there anything improper in suggesting to the jury that protection of the public is among its functions. This Court has explicitly approved jury charges which apprise the jury of its responsibilities to the public, and such charges are frequently given in the Southern District of New York. See *United States* v. *Witt*, 215 F.2d 580, 585 (2d Cir.), *cert. denied*, 348 U.S. 887 (1954). Indeed, Judge Conner in his charge gave the jury an instruction on the significance of the bribery statute similar to that contained in the prosecutor's summation.* No objection was made to his remarks when given, and none is offered now.

---

* "Congress has thus made it a crime for anyone directly or indirectly to offer or promise or give money or anything of value to a federal employee with intent to influence his decision or conduct with respect to any matter then pending or which might be brought before him in his official capacity.

The clear purpose of this statute is to protect the public from the consequences of corruption of those in the public service.

It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions." (Tr. 306).

Schurkman asserts in his brief that allusions to a defendant's future criminal conduct in a summation necessarily require reversal. That assertion is simply incorrect. Summations containing admonitions that an acquittal will "turn a defendant loose" on society have either been found unexceptionable, see *Birnbaum* v. *United States*, 356 F.2d 856, 865-68 (8th Cir. 1966), or sufficiently innocuous as to constitute harmless error. *United States* v. *Delay*, 500 F.2d 1360, 1367 (8th Cir. 1974).*

The cases on which Schurkman relies are readily distinguishable. In *Evalt* v. *United States*, 359 F.2d 534 (9th Cir. 1966), a case in which the only defense was insanity, the prosecutor told the jury that an acquittal would free the defendant even though he knew that such a verdict would result in his civil commitment for psychiatric treatment. The reversal there was based not on the jury's having received an admonition about the defendant's future behavior, but on their being deliberately misled as to the consequences of their verdict. In *United States* v. *Sprengel*, 103 F.2d 876 (3rd Cir. 1939), the prosecutor's remarks constituted one among more than a dozen grounds for reversal which the Court cited; there is nothing in the opinion to suggest that those remarks alone would have required reversal.

Finally, any assessment of the prejudicial impact of the prosecutor's remarks must take into consideration the strength of the Government's case. *United States* v. *Ong*, *supra*, 541 F.2d at 343; *United States* v. *Burse*, 531 F.2d

---

* In *Delay*, moreover, the prosecutor's comments were found harmless even though they were also knowingly false. The prosecutor had told the jury that people like the defendant should not be turned loose on society even though he knew that the defendant was serving three consecutive life sentences for murder.

1151 (2d Cir. 1976); *United States* v. *Benter*, 457 F.2d 1174, 1178 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972). Here, the Government's case against Schurkman was overwhelming.

Both Gubenko and Taylor testified fully regarding Schurkman's plan to bribe Gubenko, and their testimony was completely corroborated by tape recordings of conversations between Gubenko and Schurkman. Although Schurkman's comments on the tapes were deliberately cryptic, he discussed Taylor's insistence on receiving "paper first" before making payment (GX 2A, p. 3); he discussed receiving his "share" (*Id.*, p. 4); and he agreed to tell Gubenko what figures to enter in his workpapers. (*Id.*, p. 6). The tape recording of February 24 (GX 2) also makes clear that Schurkman communicated with Gubenko by means of written notes, a device he used because he feared that agents were "wired." Schurkman offered no evidence in his own defense, and the defense presented in his counsel's summation amounted to the assertion that both Gubenko and Taylor were lying and that the tapes should be disregarded.* No explanation of Schurkman's conduct was ever attempted by his counsel, who also wisely avoided any effort to explain why an honest accountant conducting a tax audit would be communicating with a revenue agent by means of notes. Schurkman's guilt was established overwhelmingly, and it is inconceivable that those remarks in the prosecutor's

---

* Schurkman's attempt (Br. 31) to define the issue before the jury as "[w]hether Schurkman offered a bribe or whether Gubenko was over-reaching in his approach or over-anxious to 'trap' Schurkman" reveals an astonishing indifference to the facts of the case. Schurkman's counsel explicitly eschewed the defense of entrapment (Tr. 237), and the issue was never put before the jury.

summation which he only now finds objectionable could have affected the outcome.*

POINT III

The Admission of Testimony Concerning The Bribe Paid by Taylor to Gubenko Was Not Erroneous.

Schurkman argues that the trial court erred in permitting Gubenko to testify about a meeting with James Taylor on March 3, 1976 during which Taylor paid him a $2,000 bribe. (Tr. 69-74). Because Schurkman had withdrawn from representing Taylor on February 27, he argues that this testimony was hearsay and irrelevant to his case. Neither argument is tenable.

Taylor's remarks to Gubenko while paying him a bribe are not hearsay; they are verbal acts, and admissible under a recognized exception to the hearsay rule which permits the admission of "verbal acts—contemporaneous utterances explaining non-verbal conduct or its tenor

---

* We also think it worth noting that the prosecutor had an ample good faith basis for warning the jury about Schurkman's "corrupting activities." Prior to Schurkman's sentence, the Government presented information to Judge Conner that established that Schurkman, while a member of the Bar, arranged for a client to bribe a union official and loaned his client the money to pay the bribe at 100% interest. When prompt payment was not forthcoming, Schurkman employed several individuals with organized crime associations to collect the loan by force. Schurkman was permitted by the District Attorney of New York County to plead guilty to a misdemeanor that covered these activities, but was disbarred by order of the Appellate Division, First Department, dated May 24, 1971. Judge Conner was given a transcript of the disbarment proceeding and took all of the aforementioned facts into consideration in imposing sentence. (Tr. of Dec. 14, 1976, pp. 8-12).

[which] are not hearsay in the true sense, since they do not constitute an assertion to evidence the truth of a fact asserted." *United States* v. *D'Amato*, 493 F.2d 359, 363 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). See also *Anderson* v. *United States*, 417 U.S. 211, 219-20 (1974); *United States* v. *Annunziato*, 293 F.2d 373, 377 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961); *United States* v. *Continental Casualty Co.*, 414 F.2d 431, 434 (5th Cir. 1969). Judge Conner recognized that the evidence was being offered as a verbal act, and gave the jury an appropriate instruction:

> "I will instruct the jury that this testimony is not evidence of the truth of anything that was said by Mr. Taylor, or by this witness. It's only evidence of the fact that the statements were made. Don't assume that anything that was said between this witness and Mr. Taylor were true, and don't take this evidence as evidence of the truth of any of those statements. This testimony is only evidence of what was said, not that what was said was true." (Tr. 69).

Furthermore, the testimony of Gubenko regarding Taylor's bribe payment did not in any way deprive Schurkman of his right to cross-examine Taylor, the third party declarant. Taylor himself testified and was available for cross-examination on any statements which Gubenko attributed to him.

Schurkman further argues, it appears, that this testimony was also improperly admitted because it was irrelevant. That argument, too, is meritless. The evidence of Taylor's bribe to Gubenko could certainly have been elicited on direct examination of Taylor, for the Government is permitted to bring out information damaging to the credibility of its witnesses on direct examination, including evidence of their criminal records. Fed. R. Evid.

607; *United States* v. *Del Purgatorio*, 411 F.2d 84 (2d Cir. 1969).*

This evidence was also admissible on a second theory, which Judge Conner adopted. He ruled that "I think it aids us in interpreting some of the ambiguous statements that were made between the defendant and the witness [Gubenko]." (Tr. 71). As has been noted earlier, Schurkman's remarks in his taped conversations with Gubenko contain few explicit references to bribes.** It was well within Judge Conner's discretion to conclude that the payment of the bribe by Taylor, which Schurkman had tried strenuously to arrange, was relevant to an understanding of the many vague allusions in Schurkman's earlier remarks. See Fed. R. Evid. 401, 404(b); *Anderson* v. *United States*, *supra*, 417 U.S. at 219-20; *United States* v. *Bermudez*, 526 F.2d 89, 95-96 (2d Cir. 1975). Although Schurkman had withdrawn from the scheme by March 3, the original idea for paying a bribe was clearly his and not Taylor's. On March 3, Taylor did nothing more than execute a plan previously suggested by Schurkman; Schurkman's influence on Taylor is clearly evidenced by the fact that Taylor too passed notes to Gubenko during their conversation on March 3. (Tr. 69, 195-96).

---

* Indeed, Taylor was questioned on cross-examination by Schurkman's counsel about the bribe paid to Gubenko. (Tr. 226-31).

** Typical remarks by Schurkman in the taped conversations are: "Basically he wants to go along with the thing . . ." (GX 2A, p. 2); "He has, he really has no choice but to cooperate with it and that's the only way he's got." (*Id.*, p. 6); ". . . he wants to do it the way I spoke to you. . . . And I can't see it that way." (GX 3A, p. 2); "Supposedly all he wants to do is have the paper first. I said no way." (GX 4A, p. 1).

Judge Conner, furthermore, carefully instructed the jury that the bribe payment to Gubenko formed no part of the charge against Schurkman:

> "I should counsel the jury that in letting in evidence of a possible bribe paid by Mr. Taylor, you are not to assume that this defendant had anything whatever to do with that bribe. He is not being tried for that bribe given by Mr. Taylor. He is being tried for offering a bribe before that transaction with Mr. Taylor took place and I am admitting this evidence of the later bribe in only for whatever consideration you might want to give it in determining what the conversations between the witness and the defendant meant.
>
> It will be up to you to determine whether there is any connection between those two and whether the later transaction affords you any assistance in determining what some of the ambiguous terms used in the conversations meant." (Tr. 74).

Given the care with which the jury was instructed, and the limited purpose for which the evidence was admitted, there could have been no possible prejudice to Schurkman.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JEREMY G. EPSTEIN,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1976— 714—017—551

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Jeremy G. Epstein being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 24th day of February, 1977 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Herbert Lyon, Esq.
Lyon and Erlbaum
123-60 83 Avenue
Kew Gardens, N.Y. 11415

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jeremy G. Epstein

Sworn to before me this

24th day of February, 1977

Jeanette Ann Grayer

JEANETTE ANN GRAYER
Notary Public, State of New York
No. 24-[illegible]1575
Qualified in Kings County
Commission Expires March 30, 1979